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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-203241

DATE: September 9, 1981

MATTER OF: Applied Devices Corporation

DIGEST:

1. Where letter to contracting agency conveys protester's concern that amendment to specifications was improperly based on its unsolicited proposal and requests that sole-source solicitation be withdrawn and procurement resolicited on competitive basis, it suffices as a protest even though the word "protest" was not used. Consequently, since protest to agency was timely filed and subsequent protest to General Accounting Office was filed within 10 working days of agency's denial of protest, matter is timely presented to GAO under Bid Protest Procedures.
2. Contention that agency based specification amendment on information contained in protester's unsolicited proposal is without merit as protester has not refuted agency's position that the agency based the amendment on information in its possession prior to its receipt of the unsolicited proposal.

Applied Devices Corporation (ADC) protests a sole-source award to Motorola, Inc. for multifunction radar transponder beacons under request for proposals (RFP) No. DAAK20-80-R-0316 issued by the U.S. Army Communications and Electronics Command, Fort Monmouth, New Jersey. ADC contends that an amendment to the RFP specifications was improperly based on information obtained from an unsolicited proposal submitted by ADC and that these changes show that no firm including Motorola can supply "off-the-shelf" units that meet these new requirements. ADC therefore concludes that

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all qualified firms should be given the opportunity to develop equipment for this procurement. For the reasons discussed below, this protest is denied.

On July 16, 1980, the Army issued an RFP to Motorola calling for a proposal to be submitted August 29, for 10 development models of a multifunctional radar transponder beacon for engineering testing to determine whether the beacon could be used with the radars used in seven types of supporting tactical aircraft. This radar beacon had been commercially developed and exclusively manufactured by Motorola. The Army determined it to be the only one available which could operate in the required three radar bands. The Army further believed it was the only one which could be modified for military operation by 1982. The sole-source justification stated there was not time to write adequate specifications for a competitive procurement because of the time required to study the technical characteristics of the radars used in the seven types of aircraft.

The proposed procurement action was published "for information purposes only" in the Commerce Business Daily on July 1. In response to an ADC request, the Army sent that firm a copy of the specifications. By letter of November 7, ADC requested that the Army make no sole-source award until it had reviewed an unsolicited proposal ADC was preparing. ADC stated the specifications were virtually identical to those for a dual band beacon (AN/TPN-28) recently developed and tested by ADC for the Air Force.

ADC's proposal was submitted on November 24 and after evaluation was rejected on February 20, 1981, because the Army felt extensive modifications would have to be made to the dual band AN/TPN-28 to meet its requirements for the three band beacon. These required modifications included weight reduction and an improved self-test capability. By letter of February 27, ADC requested an opportunity to modify its proposal to correct these shortcomings and, without waiting for a reply, submitted an amended proposal on March 18. ADC contended its modified AN/TPN-28 dual band beacon would meet all of the environmental, reliability and maintainability requirements of the Army specifications and nearly all of the functional requirements.

During this same period, as the result of consultation with the Marine Corps and earlier independent testing of the AN/TPN-28, an amended specification was released on March 9 to Motorola with which negotiations were completed on March 26. The Army awarded a contract for 10 models of the three band transponder beacon to Motorola on April 23.

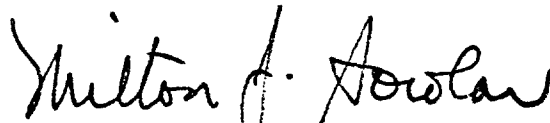
The Army provided ADC with a copy of the amended specification by letter of April 7. ADC wrote to the contracting officer on April 15 complaining that some of the changes reflected suggestions offered by ADC in its unsolicited proposal and stating "we are of the opinion that the restricted (sole-source) RFP * * * be withdrawn and a new RFP opened which would allow for competitive bidding * * *." The Army responded by letter dated April 28, which explained that the rejection of ADC's proposal was final and stated that the agency would later respond to ADC's contention that the specification amendment contained material from ADC's proposal. Prior to the receipt of the agency's April 28 response, ADC by letter dated April 24 again complained that the amendment contained ADC material, but this time specifically stated that for that reason it protested the agency's sole-source procurement. The Army denied that the amendment contained ADC's material in a letter dated May 7 and on May 11 ADC filed a protest with our Office in which it complained that the specification amendment was strongly influenced by ADC's unsolicited proposal. The protest also stated that ADC's letter to the Army of April 15, "although not stated as such," was a protest against the sole-source aspect of the RFP.

The Army contends that ADC's April 15 letter does not constitute a protest and therefore concludes that ADC's protest to our Office is untimely because it was filed more than 10 days after ADC received the specification amendment. We consider ADC's letter of April 15, which was filed within 10 days of ADC's receipt of the specification amendment, as a timely protest to the agency. See Bid Protest Procedures, 4 C.F.R. Part 21 (1981), §§ 21.2(a) and 21.2(b)(2). While it is preferable that a bidder use the word "protest" to convey its intent, that intent may be construed from an expression of dissatisfaction and a request for corrective action, Abreen Corporation, B-197261, April 18, 1980, 80-1 CPD 274. ADC's April 15 letter conveyed ADC's dissatisfaction and stated its opinion that the sole-source solicitation should be withdrawn and a new competitive solicitation issued. Under these circumstances the fact that the letter did not use the word "protest"

is not decisive. Pitney Bowes, Inc., B-200016, December 30, 1980, 80-2 CPD 448. ADC's protest to us filed on May 11 was received within 10 working days of ADC's receipt of the Army's response of May 7 and is therefore timely under our Procedures. 4 C.F.R. § 21.2(a).

We see little substance, however, to the protest itself. With respect to ADC's contention that the Army's amendment to the specifications reflected suggestions made in ADC's unsolicited proposal, ADC has not refuted the Army's assertions that its amendment was based on information properly in the Government's possession prior to its receipt of ADC's unsolicited proposal, and the record clearly indicates the specification changes were based on five different reports dated from September to December 18, 1980, each of which was generated under sponsorship of the Government. In this respect the Army correctly points out that Defense Acquisition Regulation § 4-911 (1976 ed.) states the Government is not precluded from using any data, concept or idea which it could have used had the unsolicited proposal not been submitted. Further, ADC does not explain its contention that the specification change means that no firm can supply an "off-the-shelf" unit to meet the new requirements. The Army, on the other hand, states that Motorola does have a commercial item which can meet its needs. On this record, therefore, we find no basis to sustain the protest.

The protest is denied.



Acting Comptroller General
of the United States